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**Limiting State Medicaid Agency Attempts  
to Expand the “Any Circumstances” Test:  
An Analysis of Massachusetts’ Multiyear Legal Battle  
Over the Use of Irrevocable Trusts in Long-Term Care Planning**  
*By Lisa M. Neeley, Esq.*

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# Limiting State Medicaid Agency Attempts to Expand the “Any Circumstances” Test: An Analysis of Massachusetts’ Multiyear Legal Battle Over the Use of Irrevocable Trusts in Long-Term Care Planning

*By Lisa M. Neeley, Esq.*

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## I. Introduction

The use of irrevocable trusts in the long-term care planning context has long been fraught with controversy and confusion. Despite provisions within the federal Medicaid statute permitting the use of such trusts,<sup>1</sup> state courts, federal courts, and Congress alike have tended to look with disfavor upon using such trusts as a long-term care planning tool. Over the past several years, the conflict between the desire of individuals to use irrevocable trusts to plan for their futures and the resistance of state Medicaid agencies regarding the use of such trusts has dramatically come to a head. This article focuses on recent trust litigation in Massachusetts, whose appellate court decisions have influenced Medicaid cases in neighboring states and beyond for two decades.

In the seminal 1996 Massachusetts Supreme Judicial Court case of *Cohen v. Commissioner of the Division of Medical Assistance*,<sup>2</sup> the state's highest court decreed that the principal of an irrevocable trust in which the trustee had total discretion to make distributions to the grantor was a countable asset for Medicaid eligibility purposes.<sup>3</sup>

The tide somewhat reversed upon the implementation of the Deficit Reduction Act (DRA) in 2005.<sup>4</sup> The DRA imposed a uniform five-year penalty period for transfers to both trusts and individuals.<sup>5</sup>

Previously, there had been only a three-year penalty period applicable to transfers to individuals. Thus, following the enactment of the DRA, irrevocable trusts — in which the grantor's retained rights were limited — came back into use.

However, the post-DRA honeymoon period for such trusts in Massachusetts was short-lived. In 2009, the Massachusetts Appeals Court, in the case of *Doherty v. Director of the Office of Medicaid*,<sup>6</sup> upheld the denial of benefits to an applicant for Medicaid long-term care benefits because the applicant had an irrevocable trust, and the state Office of Medicaid (MassHealth) began to take an aggressive stance against the use of all irrevocable trusts by long-term care benefit applicants.<sup>7</sup> Irrevocable trusts that seemingly should have passed muster under the federal statute's "any circumstances" test frequently came under attack by the agency.

By 2012, Massachusetts elder law practitioners reported that virtually all applications submitted to MassHealth from applicants with irrevocable trusts resulted in a denial of eligibility for long-term care benefits. Such blanket denials triggered an explosion of fair hearing decisions on the rejection of long-term care applications that featured an irrevocable trust as a long-term care planning tool.<sup>8</sup> In the majority of reported cases, property — most typically an applicant's primary residence

1 42 U.S.C. §§ 1396–1396w-5.

2 *Cohen v. Comm'r of the Div. of Med. Assistance*, 423 Mass. 399 (1996).

3 Susan Levin, *MassHealth and Resource Planning*, in *Estate Planning for the Aging or Incapacitated Client in Massachusetts* § 34.5 (Donald N. Freedman & Emily S. Starr eds., 4th ed. 2012, & Supp. 2015).

4 Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4.

5 Under prior law, transfers to individuals were subject to a shorter, three-year look-back pe-

riod than transfers to trusts.

6 74 Mass. App. 439 (2009).

7 See discussion *infra* Part II.

8 See William J. Brisk & Rebecca Flewelling, *Trusts Used in Medicaid Planning: The Doherty Challenge to Irrevocable Income Only Trusts and Its Aftermath*, 96 Mass. L. Rev. 95, 97 (2015). The article contains a comprehensive survey of cases and reasons cited by MassHealth for denying long-term care benefits to applicants with irrevocable trusts.

— had been transferred into an irrevocable trust more than five years prior to the submission of a MassHealth application.<sup>9</sup> The majority of trusts triggering denials also prohibited the distribution of trust principal to applicants applying for long-term care benefits.<sup>10</sup> The trusts, on their face, reasonably should have been deemed noncountable resources as they were established and funded prior to the five-year look-back period and survived the any circumstances test because trust principal was not payable to or payable on behalf of the applicant by the explicit terms of the trust.

As applications from those with irrevocable trusts generated more denials, it became clear that MassHealth was expanding the boundaries of the federal statute’s any circumstances test by concluding that common trustee administrative and investment powers, such as the ability to purchase an annuity with trust assets or to allocate receipts and charges between income and principal, enabled a grantor who was not the trustee to access and control trust principal.<sup>11</sup> MassHealth made such conclusions despite clear trust language prohibiting the distribution of trust principal to the grantor.<sup>12</sup> Other common trust provisions the agency cited in support of the denials included the grantor’s retained special power of appointment, the trustee’s ability to substitute trust assets with those of equivalent value to retain favorable tax treatment, and the applicant’s continuing ability to live in his or her residence following its transfer into

a trust through a “use and occupancy” clause or a retained life estate in the deed transferring the property into a trust.<sup>13</sup>

Elder law attorneys across the state banded together to share fair hearing decisions and strategize in response to MassHealth’s attacks on the use of irrevocable trusts as a long-term care planning tool. Denied applications were appealed administratively to the MassHealth Board of Hearings and then judicially to the Massachusetts Superior Court, with mostly dismal results at both levels.<sup>14</sup> A major frustration involved the inconsistent decisions issued by various Board of Hearings officers and superior court judges across the state. It was not uncommon for practitioners to receive a decision approving an application from an applicant with an irrevocable trust following an administrative hearing followed by a decision denying an application from an applicant with an identical trust by a different hearing officer or on appeal before a superior court judge in a different case.<sup>15</sup> It became critical for elder law attorneys and their clients to obtain an appellate-level decision with binding precedent that would clarify the state of the existing law regarding irrevocable trusts and the application of the any circumstances test to determine a Medicaid applicant’s ability to reach assets in an irrevocable trust.

On April 15, 2016, 20 years after *Co-*

9 *Id.* at 103.

10 *Id.* at 104-105.

11 *Id.* at 101-102.

12 See e.g. *Heyn v. Dir. of the Office of Medicaid*, 89 Mass. App. Ct. 312, 315 (2016) (The Trust prohibited the distribution of principal to the applicant for benefits.).

13 Brisk & Flewelling, *supra* note 8, at 107, 110–111.

14 See e.g. *Roche v. Thorn*, No. WOCV2013-02261A (Mass. Super. Ct. 2013); see also *Sands v. Exec. Office of Health & Human Servs.*, No. SUCV2013-3537-A (Mass. Super. Ct. 2013).

15 See e.g. *Roche v. Thorn*, No. WOCV2013-02261A; *O’Leary v. Thorn*, No. WOCV2013-01929A (Mass. Super. Ct. 2014) (Cases with opposite outcomes at the Massachusetts Superior Court involving an analysis of the identical form of irrevocable trust.).

hen and 10 years after the effective date of the DRA, the Massachusetts Appeals Court upheld the validity of the use of irrevocable trusts in the long-term care planning context.<sup>16</sup> The case, *Heyn v. Director of the Office of Medicaid*, squarely rejected many of the arguments MassHealth had advanced over the years to support its routine denials of benefits to applicants with such trusts.<sup>17</sup> The Appeals Court determined, for example, that, in the face of clear trust language that otherwise prohibited distributions of trust principal, the trustee's ability to purchase an annuity with trust assets or to allocate between trust income and principal did not provide the MassHealth applicant with access to trust principal.<sup>18</sup> Also rejected were the agency's arguments that a limited power of appointment retained by the grantor or the trustee's ability to substitute assets of equivalent value provided the grantor with access to trust principal.<sup>19</sup> Most significantly, the Court confirmed that pursuant to the any circumstances test, the sole analysis to determine whether irrevocable trust assets are countable is whether the MassHealth applicant can receive distributions of trust principal.<sup>20</sup> Thus, pursuant to the controlling federal statute, MassHealth cannot include the principal of an applicant's irrevocable trust as a countable resource if the trust prohibits the distribution of principal to the applicant.<sup>21</sup>

Following *Heyn*, challenges to the use of irrevocable trusts in the long-term care planning context remain. Other cases centering on an applicant's continued use

and occupancy of a residence transferred into an irrevocable trust have emerged.<sup>22</sup> MassHealth reasons that a retained occupancy right renders a residence held in trust "available" and thus countable in an applicant's long-term care benefit eligibility determination.<sup>23</sup> Similar to the agency's previous positions debunked by *Heyn*, its position on the use and occupancy right fails to explain how in practical terms the right enables an applicant to receive a distribution of or otherwise consume principal from the underlying trust corpus.<sup>24</sup> The use and occupancy cases are making their way through the Massachusetts judicial system, with the first of such cases, *Nadeau v. Thorn* and *Daley v. Sudders*, expected to be decided by the state's Supreme Judicial Court in 2017.<sup>25</sup>

This article provides elder law practitioners with an overview of the challenges experienced by Massachusetts attorneys regarding the treatment of irrevocable trusts used in the long-term care planning context. It is the author's hope that elder law practitioners nationwide will find this article helpful as they deal with similar challenges raised by their own state Medicaid agencies.

## II. Historical Analysis of the Any Circumstances Test

On August 10, 1993, President Clinton signed into law the Omnibus Budget Reconciliation Act of 1993 (OBRA 93).<sup>26</sup> OBRA 93 affects many federal programs, and the Medicaid rules are codified at 42 U.S.C. § 1396p. Among the law's many

16 See *Heyn*, 89 Mass. App. at 313.

17 *Id.* at 318–19.

18 *Id.* at 317–18.

19 *Id.* at 318.

20 *Id.* at 315.

21 *Id.* at 315–19.

22 See *Nadeau v. Thorn*, No. SJC-12205 (Mass. argued January 5, 2017); *Daley v. Sudders*, No. SJC-12200 (Mass. argued January 5, 2017).

23 *Nadeau*, No. SJC-12205.

24 *Id.*

25 *Id.*; *Daley*, No. SJC-12200.

26 Pub. L. No. 103-66, 107 Stat. 312 (1993).

complex provisions are sections concerning the treatment of trusts used in connection with obtaining eligibility for Medicaid long-term care benefits.<sup>27</sup>

The federal statute mandates application of the any circumstances test to determine whether all or portions of a trust “established” by an individual applying for Medicaid must be counted as an asset.<sup>28</sup> In order for the state Medicaid agency to consider a trust as having been established by an applicant, § 1396p(d)(2) requires that certain conditions be satisfied.<sup>29</sup> First, the assets of the individual or spouse must form all or part of the corpus of the trust.<sup>30</sup> Second, the trust must be nontestamentary and must have been established by the individual, his or her spouse, or a third person with legal authority to act on behalf of the individual or spouse, such as a court.<sup>31</sup>

If the trust meets these conditions and can be properly considered as having been established by the applicant, the any circumstances test can proceed. The federal statute provides:

In the case of an irrevocable trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual . . .<sup>32</sup>

The corresponding regulation at 130 Code of Massachusetts Regulations

520.023(C)(1)(a) provides that the principal of an irrevocable trust is a “countable asset” if it “could be paid under any circumstances to or for the benefit of the individual.”<sup>33</sup>

Thus, under the any circumstances test, any portion of the income or principal of an irrevocable trust that can be paid to an applicant must be considered a countable resource in that applicant’s long-term care benefit eligibility determination.<sup>34</sup> Payments of trust income to the individual make up part of the individual’s monthly payment to a nursing facility, the Patient Paid Amount.<sup>35</sup> Income that can be distributed but that has been retained in the trust can be counted as a resource in the applicant’s benefit eligibility determination.<sup>36</sup> Such retained income would then need to be spent down in order for the applicant to maintain eligibility for long-term care benefits.<sup>37</sup>

For purposes of the statute, any portion of the irrevocable trust that could *not* be paid to or for the benefit of the applicant is considered a transfer without fair consideration.<sup>38</sup> The transfer of an asset into a properly established irrevocable trust results in a five-year ineligibility period for Medicaid long-term care benefits.<sup>39</sup> However, once this period has expired, any portion of the corpus of the irrevocable trust that could not be paid to or for the benefit of the applicant cannot be considered a countable resource in the applicant’s benefit eligibility determination.<sup>40</sup>

27 Such provisions are found at 42 U.S.C. § 1396p(d) (2012).

28 *Id.*

29 *Id.* at § 1396p(d)(2).

30 *Id.* at § 1396p(d)(2)(A).

31 *Id.*

32 *Id.* at § 1396p(d)(3)(B)(i).

33 130 Mass. Code Regs. 520.023(C)(1)(a) (2014).

34 *Id.* at 520.023(C)(1)(b).

35 *Id.*

36 *Id.* at 520.023(C)(1)(a).

37 *Id.* at 520.023(C)(1)(b).

38 *Id.* at 520.023(C)(2).

39 *See id.* at 520.023(A).

40 *Id.* at 520.023(C)(2).

*A. Cohen and the “Peppercorn of Discretion” Test*

The Massachusetts Supreme Judicial Court case of *Cohen v. Commissioner of the Division of Medical Assistance* was the first appellate decision in Massachusetts to clarify the state of the law at the time regarding irrevocable trusts used in the long-term care planning context.<sup>41</sup> Although *Cohen* involved irrevocable trusts created prior to OBRA 93 and the codification of the any circumstances test, the principles articulated in *Cohen* regarding the effectiveness of irrevocable trusts for long-term care planning remain relevant in an analysis of irrevocable trusts established after OBRA 93.<sup>42</sup>

For example, in *Heyn*, the court noted via footnote that the any circumstances test replaced the peppercorn of discretion test articulated by the *Cohen* Court.<sup>43</sup> The *Heyn* court was careful to note, however, that although the lower court judge had framed his analysis of the irrevocable trust with reference to the peppercorn of discretion test rather than the any circumstances test, the difference was “immaterial to the result in this case.”<sup>44</sup> Both tests focus on the critical issue of whether the rights retained or granted in the trust under examination allow payment of trust principal to the applicant for benefits.

*Cohen* actually consisted of four cases consolidated by the Supreme Judicial Court on appeal.<sup>45</sup> Each of the irrevocable trusts in the four cases contained language that gave the trustee unlimited discretion to distribute principal to the grantor un-

til the grantor required long-term care, at which point the trustee would be precluded from making any distributions to the grantor.<sup>46</sup> The relevant language in one of the trusts follows: “The Trustees may, from time to time and at any time, distribute to or expend for the benefit of the beneficiary, so much of the principal and current or accumulated net income as the Trustees may in their sole discretion, determine... .”<sup>47</sup> The *Cohen* Court viewed such trusts as a “scheme” in which grantors had potential access to principal until the moment they needed Medicaid benefits, after which principal distributions were prohibited, allowing applicants to “have their cake and eat it too.”<sup>48</sup> *Cohen* accordingly held that if the trustee had so much as a “peppercorn of discretion [to distribute trust principal], then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility.”<sup>49</sup>

In an attempt to flesh out the language and purposes of the federal Medicaid rules governing the treatment of irrevocable trusts, the *Cohen* Court equated such trusts with spendthrift trusts that are typically ineffective to protect against a grantor’s creditors.<sup>50</sup> Regarding irrevocable trusts, the Court noted that the Restatement (Second) of Trusts had similarly instructed that “the full amount of the monies that the trustee could in his or her discretion ‘under the terms of the trust’ pay to the grantor, is the amount available to the grantor and thus to his or her

41 *Cohen v. Comm’r of the Div. of Med. Assistance*, 423 Mass. 399 (1996).

42 See *Heyn v. Dir. of the Office of Medicaid*, 89 Mass. App. Ct. 312, 314-15 (2016).

43 *Id.* at 315 n. 7.

44 *Id.*

45 *Cohen*, 423 Mass. at 401.

46 *Id.* at 413-16.

47 *Id.* at 415.

48 *Id.* at 414.

49 *Id.* at 413.

50 *Id.* at 414-15; see *Ware v. Gulda*, 331 Mass. 68 (1954).

creditors.”<sup>51</sup>

The same principle that renders a spendthrift trust available to creditors should theoretically make it an available and thus countable asset for purposes of a Medicaid benefit eligibility determination. If no principal from the trust can be paid to an applicant, the trust should not be considered a countable resource in the applicant’s Medicaid benefit eligibility determination. This interpretation also aligns with the language and purpose of the any circumstances test, which requires individuals to deplete assets capable of being paid to them under the terms of an irrevocable trust for their nursing home care before Medicaid will pay for such care.<sup>52</sup>

#### B. Post-OBRA 93 Trusts and the Any Circumstances Test

The any circumstances test controls the determination of whether assets from an irrevocable trust established after OBRA 93 are countable resources of an individual applying for long-term care benefits.<sup>53</sup> Of the key Massachusetts appellate cases decided after *Cohen* and prior to *Heyn*, only *Doherty v. Director of the Office of Medicaid* involved the application of the post-OBRA 93 any circumstances test.<sup>54</sup> The other cases involving Medicaid and trusts, *Lebow v. Commissioner of the Division of Medical Assistance* and *Guerrero v. Commissioner of the Division of Medical Assistance*, applied the pre-OBRA 93 peppercorn of discretion test.<sup>55</sup>

Even though the *Heyn* court noted that the application of the peppercorn of discretion test or the any circumstances test would likely result in the same decision, the fact remains that *Doherty*,<sup>56</sup> the sole Massachusetts appellate decision prior to *Heyn* that applied the any circumstances test, was muddled by bad facts and thus created bad law. As a result, MassHealth had substantial success expanding the reach of the any circumstances test by taking advantage of both *Doherty* and the lack of state or federal appellate case law clarifying the parameters of the test.

In *Heyn*, the trust provisions prohibited the MassHealth applicant from receiving any distributions of trust principal and allowed her to receive distributions of the trust’s income only.<sup>57</sup> Such restrictions on access to principal are distinguishable from cases such as *Cohen*, *Lebow*, and *Doherty*, in which the Massachusetts appellate courts determined that irrevocable trust assets were countable resources due to provisions that were contrary to public policy or that appeared to provide an opening for the grantor to receive distributions from trust principal.<sup>58</sup> The appeals court in *Heyn* thus refused to accept MassHealth’s exhortation to read between the lines of the trust and speculate that the trustee could somehow reach trust assets for the grantor’s benefit.<sup>59</sup> The *Heyn* case confirms that the ability of the

51 *Cohen*, 423 Mass. at 414-15; see Restatement (Second) of Trusts § 156 (Am. Law Inst. 1959).

52 42 U.S.C. § 1396p(d).

53 *Id.*

54 *Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. 439, 440 (2009).

55 See *Lebow v. Comm’r of the Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2001) (apply-

ing the pre-OBRA 93 statute but including a discussion of the post-OBRA 93 any circumstances test); see also *Guerrero v. Comm’r of the Div. of Med. Assistance*, 433 Mass. 628, 633-634 (2001) (also applying the pre-OBRA 93 statute but containing a discussion of the post-OBRA 93 any circumstances test).

56 See discussion *infra* Part III.

57 See *Heyn v. Dir. of the Office of Medicaid*, 89 Mass. App. Ct. 312, 315 n. 8 (2016).

58 See *Doherty*, 74 Mass. App. at 441.

59 *Heyn*, 89 Mass. App. at 319.

MassHealth applicant to receive distributions of trust principal controls the analysis of whether an irrevocable trust is to be considered a countable resource in a long-term care benefit eligibility determination.<sup>60</sup> Such analysis cannot be controlled by mere speculation of trustee collusion and breach of fiduciary duties.

### III. *Doherty v. Director of the Office of Medicaid*

The *Doherty* trust appeared, on its face, to prohibit distributions of principal to the MassHealth applicant, but embedded within the instrument was a provision allowing the trustee to terminate the trust and distribute the entirety of its corpus directly to the applicant.<sup>61</sup> This provision ultimately rendered the assets of the trust fully countable in the applicant's long-term care benefit eligibility determination.<sup>62</sup> On these grounds, the court was correct in holding that the trust was a fully countable resource because there were circumstances under which the trust could be terminated and principal could be paid to the applicant.

However, in dicta, the court discussed other trust language it found offensive, including language describing the trustee's ability to allocate between income and principal, language in a clause allowing the applicant to use and occupy a residence transferred into trust, and language in instructions to the trustee to conserve assets for the applicant's future needs to allow her to remain in the community for as long as possible.<sup>63</sup> These provisions, when read in combination with the termination clause that allowed a complete distribu-

tion of principal to the applicant, likely swayed the court's decision in favor of the agency.<sup>64</sup> Without the termination clause, it is questionable whether these provisions alone would have resulted in a finding that the trust was a countable resource. The decision muddied the waters concerning the application of the any-circumstances test in Massachusetts by providing MassHealth with a basis to challenge every application with an irrevocable trust, including applications with trusts that were properly drafted to exclude the grantors' ability to enjoy trust principal.

*Doherty* established the principle that irrevocable trust provisions must be considered as a whole in a Medicaid eligibility analysis and that no one provision should be interpreted as if it existed within a vacuum.<sup>65</sup> Since the release of the *Doherty* decision, MassHealth has used this principle to argue that certain administrative provisions within an irrevocable trust, such as the ability of the trustee to purchase an annuity, must be read apart from provisions that expressly prohibit a grantor's ability to access trust principal.<sup>66</sup> Reading the instrument as a whole, according to the agency, means ignoring irrevocable trust provisions that prohibit distributions of principal to the grantor and reading into the trust contrived scenarios in which the trustee could make a hypothetical distribution of trust assets to the applicant for benefits.

### IV. The Post-*Doherty* Explosion of Denials of Benefits to Applicants With Irrevocable Trusts

*Doherty* opened the door for myriad

60 *Id.*

61 See *Doherty*, 74 Mass. App. at 439, 441.

62 *Id.* at 442.

63 *Id.* at 441.

64 *Id.* at 442–43.

65 *Id.* at 440–41.

66 See Brisk & Flewelling, *supra* note 8, at 99–103.

MassHealth attacks against irrevocable trusts. In the post-*Doherty* world, the agency has frequently claimed that it does not need to consider well-established principles of trust and fiduciary law when determining the countable nature of a particular irrevocable trust and that it can instead focus its determination solely on the agency’s interpretation of the any circumstances test.<sup>67</sup> The agency has used such an argument to contrive a variety of hypothetical scenarios in which principal could be paid to a MassHealth applicant that are otherwise impossible when considering the terms of the trust.<sup>68</sup> However, prior to *Heyn*, the agency’s proposed scenarios typically required a trustee to breach his or her fiduciary duties and flagrantly disregard trust law, fiduciary principles, and basic accounting and investment standards.

*A. Frequently Cited Reasons for Denials*

One of the more common MassHealth arguments as to why an otherwise properly drafted irrevocable trust should be deemed countable is due to the inclusion of certain investment and administrative powers of the trustee.<sup>69</sup> For example, the agency has frequently claimed that the trustee’s ability to sell a residence within an irrevocable trust and then invest the proceeds in an annuity renders the assets of the trust fully countable.<sup>70</sup> In making this argument, the agency appears to ignore the fact that annuity payments comprise both income and principal and that the principal portion would be retained in the trust and could not be distributed to the grantor of the irrevocable trust under

any circumstances. The agency has also argued that pursuant to the trust’s broad allocation powers, the trustee could allocate the entire annuity payment to income and pay all the proceeds, consisting of both the income and principal portion, to the MassHealth applicant.<sup>71</sup> Such an argument disregards basic fiduciary accounting principles governed by the Massachusetts Principal and Income Act.<sup>72</sup> Despite this, MassHealth has succeeded in convincing both hearing officers and trial court judges that these arguments have merit.<sup>73</sup>

Another typical argument advanced by the agency is that the inclusion of a limited or special power of appointment grants the applicant the ability to distribute trust assets to children, who in turn could distribute such assets back to the applicant.<sup>74</sup> The agency has perceived a trustee’s ability to substitute assets with those of equivalent value as granting the applicant unfettered access to principal.<sup>75</sup> Other post-*Doherty* arguments MassHealth has successfully presented include: 1) the grantor’s perceived control over trust assets;<sup>76</sup> 2) the grantor’s ability to serve as trustee under the terms of the trust;<sup>77</sup> 3) the trustee’s ability to mortgage or make a loan with trust assets;<sup>78</sup> 4) the trustee’s ability to pay estate or income taxes with trust assets;<sup>79</sup> 5) the ability to terminate a trust and distribute assets to

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67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

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71 *Id.* at 112.

72 Massachusetts Principal and Income Act, Mass. Gen. Laws ch. 203D (2006).

73 Brisk & Flewelling, *supra* note 8, at 112 (noting the number of approvals and denials, and conflicting decisions, featuring trusts with similar provisions).

74 *Id.*

75 *Id.* at 99–102.

76 *Id.* at 110.

77 *Id.*

78 *Id.*

79 *Id.*

beneficiaries other than the grantor;<sup>80</sup> 6) the applicant's ability to use and occupy a residence retained in the trust;<sup>81</sup> and 7) the belief that trusts are against public policy because Medicaid is an insurance program for the poor, and individuals should not be permitted to shelter their assets while obtaining taxpayer-funded health insurance benefits.<sup>82</sup>

*B. Similar Arguments Struck Down in 2002 New York Cases*

New York state encountered a similar issue regarding the unlawful denial of benefits to applicants using irrevocable trusts as a long-term care planning tool in the analogous cases of *Verdow v. Sutkowy*<sup>83</sup> and *Spetz v. New York State Department of Health*.<sup>84</sup> Both decisions were decided in 2002. In each case, similar arguments were made by the state's Medicaid agency regarding including irrevocable trusts as countable resources in an applicant's eligibility determination if the trust instrument includes a termination clause, a retained special power of appointment, and some perceived level of control over

trust assets by the applicant.<sup>85</sup> The benefit applicants prevailed in both *Verdow* and *Spetz*, with each court determining that the provisions in the respective trusts did not provide any circumstances under which principal could be paid to the applicant.<sup>86</sup> Thus, the trusts survived the federal statute's test and the corpus of each trust could not be deemed a resource.<sup>87</sup>

As a result of these decisions, the state's Medicaid agency issued a memorandum to benefit enrollment centers containing specific instructions regarding treating irrevocable trusts as countable resources in a long-term care benefit eligibility determination. For example, the memorandum noted, "assets in an irrevocable trust cannot be considered available to the [applicant] based on the remote possibility of collusion among the grantor, the trustee, and the beneficiaries."<sup>88</sup> The memorandum clarified to the enrollment centers that trust assets could be considered resources only to the extent that payments could be made to or for the benefit of the applicant. Retention of a limited power of appointment or the statutory right to revoke the trust did not represent the circumstances contemplated by the Medicaid statutes and implemented regulations. As a result of the *Verdow* and *Spetz* decisions and the state Medicaid agency's memorandum, New York has not experienced the waves of unlawful benefit denials to applicants

80 *Id.*

81 *Id.*; see also *Nadeau v. Thorn*, No. SJC-12205 (Mass. argued January 5, 2017) (This is the issue on appeal before the Supreme Judicial Court.).

82 Brisk & Flewelling, *supra* note 8, at 110. This is a common argument advanced by the MassHealth agency in its pleadings and memoranda submitted in the administrative hearings, Superior Court proceedings, and the Appellate Court proceedings. See Brief of the Defendant-Appellee, at 12-16, *Nadeau*, SJC-12205. *But see* Brief of the National Academy of Elder Law Attorneys as Amicus Curiae Supporting Plaintiff-Appellant, at 4-13, *Nadeau*, SJC-12205.

83 *Verdow v. Sutkowy*, 209 F.R.D. 309 (N.D.N.Y. 2002).

84 *Spetz v. New York State Dep't of Health*, 737 N.Y.S.2d 524 (N.Y. Sup. Ct. 2002).

85 *Verdow*, 209 F.R.D. at 315-16; *Spetz*, 737 N.Y.S.2d at 526-27.

86 *Verdow*, 209 F.R.D. at 316; *Spetz*, 737 N.Y.S.2d at 528.

87 *Verdow*, 209 F.R.D. at 316; *Spetz*, 737 N.Y.S.2d at 528.

88 Office of Medicaid Mgmt., *Verdow and Spetz Court Decisions – Availability of Assets Held in Irrevocable Trusts*, GIS 04 MA/001 (Jan. 20, 2004), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/gis/04\\_ma001.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/04_ma001.pdf).

with irrevocable trusts that have been occurring in Massachusetts.

*C. MassHealth Fair Hearing Process  
Contributes to the Chaos*

The MassHealth fair hearing process has contributed to the chaos and confusion surrounding the agency’s blanket denials of benefits to applicants with irrevocable trusts. When an application is denied by an agency caseworker and such denial is appealed, a fair hearing is scheduled before the Office of Medicaid’s Board of Hearings.<sup>89</sup> MassHealth’s legal office typically generates a lengthy memorandum explaining the basis for the denial that it only shares with the agency’s caseworker. In a typical adversarial administrative law proceeding governed by Massachusetts General Law chapter 30A, § 14 (2015), the state agency and the plaintiff exchange papers in support of their positions prior to the hearing date. However, in a typical MassHealth administrative proceeding, the agency almost always refuses to provide the applicant’s attorney with a copy of the legal memorandum until the day of the hearing, citing attorney-client privilege. Caseworkers are instructed not to release the memorandum or even provide the applicant’s attorney with a verbal explanation of the basis for the denial. The MassHealth attorney who determined the outcome of the application and prepared the memorandum never attends the fair hearing. Thus, the applicant’s attorney is given no clarification of the agency’s position or given the opportunity to cross-examine the decision-maker under oath at a hearing before a Board of Hearings officer.

Massachusetts regulations permit appellants to request permission from the Board of Hearings to subpoena the

MassHealth memorandum and records in advance of the hearing.<sup>90</sup> However, individual appellants have no ability to issue a subpoena and such requests to the Board of Hearings are almost always denied.

As a result of MassHealth’s refusal to cooperate in the fair hearing process, when MassHealth’s wave of post-*Doherty* denials began, attorneys for appellants frequently were reduced to attending hearings unprepared to address the agency’s arguments. This unfair advantage afforded to the state agency likely led to an initial higher number of losses by applicants with trusts who appealed their denials to the Board of Hearings.

By sharing war stories and information, the Massachusetts elder law bar began to gain a clearer understanding of the basis for MassHealth’s negative treatment of validly drafted trusts and began to formulate the appropriate legal arguments to present to the Board of Hearings. Success against the wave of unlawful denials of benefits to applicants with irrevocable trusts was slowly being achieved at the administrative level.<sup>91</sup> However, a favorable appellate court decision that would establish precedent and bind the agency was still desperately needed.

**V. The Tide Begins to Turn: *Heyn v. Director of the Office of Medicaid***

The *Heyn* case originated in 2013 when MassHealth sent a notice terminating a MassHealth recipient’s eligibility for long-term care benefits due to the existence of the applicant’s irrevocable trust, funded in 2003, that gave the grantor the right to distributions of income generated by trust

<sup>90</sup> See 130 Mass. Code Regs. 610.052.

<sup>91</sup> Brisk & Flewelling, *supra* note 8, at 113 (A chart illustrates that 29 percent of applicants with trusts were approved in 2013 while 59 percent were approved in 2014.).

<sup>89</sup> See 130 Mass. Code Regs. 610.001.

assets but no right to distributions of trust principal.<sup>92</sup> The grantor's daughter was the trustee.

The trust was funded with a remainder interest in the primary residence, with the grantor retaining a life estate in the deed.<sup>93</sup> The applicant also retained a special lifetime power of appointment in the trust, which granted her the ability to appoint trust assets to her children only, free of trust.<sup>94</sup> The trust preserved grantor trust tax status by giving the trustee the ability to exchange assets for those of equivalent value.<sup>95</sup> Also contained within the trust instrument were the typical administrative and investment powers enabling the trustee, for example, to purchase an annuity with trust assets and to allocate receipts and charges between income and principal.<sup>96</sup> Pursuant to the terms of the trust, any such allocation was to be made specifically in accordance with reasonable accounting principles and state law.<sup>97</sup>

Eight years after the trust was created, the grantor of the trust was admitted to a long-term care facility.<sup>98</sup> She applied for and was initially granted Medicaid long-term care benefits after disclosing the existence of her trust.<sup>99</sup> However, in 2013, MassHealth reversed its position, deemed the trust a countable resource, and sent the grantor a notice terminating her benefits.<sup>100</sup> The termination was appealed, and a fair hearing was conducted before

MassHealth's Board of Hearings on June 20, 2013.<sup>101</sup> The hearing officer's decision, issued October 8, 2013, upheld the agency's termination of benefits.<sup>102</sup> The denial was then further appealed to the Massachusetts Superior Court, which also upheld the termination of benefits.<sup>103</sup>

#### A. Lower Court Proceedings in *Heyn*

In the Board of Hearings decision in *Heyn*, the hearing officer advanced several reasons for deeming the assets of the trust countable resources.<sup>104</sup> Primarily, the hearing officer determined that the trustee's ability to sell the trust assets and purchase an annuity rendered the assets countable because there was "nothing" precluding the trustee from distributing the entire annuity proceeds to the grantor.<sup>105</sup> He reached this conclusion irrespective of any consideration of trust accounting principles.<sup>106</sup> The hearing officer also determined that the ability of the grantor to appoint trust assets to her children via the special power of appointment rendered the assets of the trust countable because the children could theoretically return the appointed assets to her.<sup>107</sup> The ability of the trustee to substitute assets with those of equivalent value was also problematic, the hearing officer reasoned, because trust principal could be distributed to the applicant upon her demand with no need for her to replace it with assets of equal value, contrary to the terms of the trust.<sup>108</sup>

92 *Heyn v. Dir. of the Office of Medicaid*, 89 Mass. App. Ct. 312, 312 (2016).

93 *Id.* at 313.

94 *Id.* at 315.

95 *Id.* at 316.

96 *Id.*

97 *Id.* The state law alluded to in the trust is the Massachusetts Principal and Interest Act, Mass. Gen. Laws ch. 203D, § 18(a).

98 *Heyn*, 89 Mass. App. at 313.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*; see also *Off. of Medicaid, Bd. of Hrgs.*, App. 1306280 (2013).

103 *Roche v. Thorn*, No. WOCV2013-02261A, at 5-6 (Mass. Super. Ct. 2013).

104 *Off. of Medicaid, Bd. of Hrgs.*, App. 1306280.

105 *Id.* at 12.

106 *Id.*

107 *Id.* at 11.

108 *Id.* at 11-12.

The administrative decision was appealed to the superior court. The trial court affirmed the hearing officer’s decision upholding the termination of benefits.<sup>109</sup> The judge primarily relied upon the agency argument that trust assets could be used to purchase an annuity, which could then be fully distributed to the applicant as the trust’s income beneficiary.<sup>110</sup> The judge also determined that the ability of the trustee to exchange assets for those of equivalent value also rendered the trust a countable resource because it provided the applicant with access to trust principal.<sup>111</sup>

*B. O’Leary v. Thorn*

While the *Heyn* administrative decision was pending judicial review, an appeal of an analogous irrevocable trust case was filed in Worcester County Superior Court. In the case of *O’Leary v. Thorn*, a Massachusetts nursing home resident had deeded her house to an irrevocable trust in 2005.<sup>112</sup> The trust was also funded solely with real estate consisting of the primary residence. In an interesting twist, both the *Heyn* and *O’Leary* applicants had consulted the same law firm for their long-term care planning; both trusts were based on the same form and contained the same “problematic” provisions.<sup>113</sup>

Despite the similarities of the two trust instruments, the hearing officer deemed the *O’Leary* trust a countable resource for a reason different from that of the *Heyn*

hearing officer. In *O’Leary*, the hearing officer based his denial on Article Seventh of the trust, which states: “The trustee may apply any or all of the income or principal of any share or portion of the Trust to or for the benefit of any beneficiary in such manner and through such agencies as the trustee deems advisable instead of paying it directly to the beneficiary or his or her guardian.”<sup>114</sup> The hearing officer reasoned that this provision served to “render the trust principal within appellant’s control” and created a “circumstance under which principal can be made available or used for appellant’s benefit.”<sup>115</sup> In reaching this conclusion, the hearing officer ignored the express prohibition on the receipt of principal stated in the trust.<sup>116</sup> The power to exchange trust assets for those of equivalent value was also cited by the hearing officer as a basis for upholding the agency’s denial of benefits.<sup>117</sup>

When the *O’Leary* fair hearing decision was appealed, it made its way onto the same docket before the Worcester County Superior Court where *Heyn* was pending.<sup>118</sup> Coincidentally, the hearings on both matters occurred within several weeks of each other and were heard by the same judge.<sup>119</sup> The resulting decisions could not have been more different.

On September 28, 2014, the trial court judge in *O’Leary* granted the applicant’s motion for judgment on the pleadings based upon a determination that there were no circumstances under which prin-

109 *Roche v. Thorn*, No. WOCV2013-02261A, at 5-6 (Mass. Super. Ct. 2013).

110 *Id.* at 5.

111 *Id.*

112 *O’Leary v. Thorn*, No. WOCV2013-01929A, at 1 (Mass. Super. Ct. 2014).

113 The author represented both the *O’Leary* and *Heyn* plaintiffs and thus has firsthand knowledge to corroborate that the trusts were identical in form.

114 Off. of Medicaid, Bd. of Hrgs., App. 130518 (2013).

115 *Id.* at 7.

116 *Id.* at 6.

117 *Id.* at 7.

118 *Id.*; *Roche v. Thorn*, No. WOCV2013-02261A (Mass. Super. Ct. 2013).

119 *Roche*, No. WOCV2013-02261A; *O’Leary*, No. WOCV2013-01929A.

principal of the trust could be paid to the applicant.<sup>120</sup> In reversing the hearing officer's decision, the judge held that the terms of the trust, when read in their entirety, "intended that only the income from the asset be available" to the applicant and that "Article Second could not be more clear in stating that the Trustee cannot distribute principal" to the applicant.<sup>121</sup>

Whereas MassHealth, the hearing officers, and other trial courts have cited the appeals court decision in *Doherty* as a sword to deny benefits to applicants, the *O'Leary* judge relied on *Doherty* for the proposition that Article Seventh of the *O'Leary* trust had to be read in conjunction with a review of the entire trust instrument to glean the intent of the grantor.<sup>122</sup> Therefore, the judge reasoned that Article Seventh did not grant the trustee the ability to distribute trust principal to the grantor, especially in light of the unambiguous language at Article Second prohibiting the trustee from distributing trust principal to the grantor.<sup>123</sup>

The *O'Leary* decision also noted that Article Ninth, which allowed for the substitution of trust assets for favorable tax treatment status, similarly did not grant the trustee the ability to pay trust principal to the applicant, again in light of the clear language of Article Second prohibiting the distribution of trust principal to the applicant.<sup>124</sup> Note that in *Heyn*, the same judge upheld the fair hearing officer's determination that the power of substitution rendered the trust assets countable.<sup>125</sup> Thus, the judge rendered completely op-

posite conclusions in an analysis of identical trust provisions in decisions issued less than two weeks apart.

### C. *Heyn Affirms the Effectiveness of Irrevocable Trusts in Long-Term Care Planning*

*Heyn* was the first case in the post-*Doherty* wave of MassHealth benefit denials to applicants with irrevocable trusts to be heard by the state appeals court. As such, the Massachusetts Chapter of NAELA had a keen interest in the case and submitted an amicus brief in support, with the goal of turning the tide against the frequent unlawful benefit denials at the caseworker stage of the application process.<sup>126</sup> Writing the opinion for a unanimous court, Justice Mark Green summarily rejected all of MassHealth's arguments about why certain provisions within the trust rendered principal payable to the applicant despite clear trust language to the contrary.<sup>127</sup>

Specifically, the court reiterated that the standard in determining whether assets held in an irrevocable trust are countable resources is the any circumstances test.<sup>128</sup> The court noted that such circumstances "need not have occurred, or even be imminent" in order for the trust principal to be considered countable and that it is enough that the amount could be paid to an applicant under any circumstances.<sup>129</sup>

The court first addressed MassHealth's argument that the trustee could invest trust principal in an annuity and treat the resulting annuity payments wholly as income eli-

120 *O'Leary*, No. WOCV2013-01929A, at 4-5.

121 *Id.* at 4-6.

122 *Id.* at 4-5.

123 *Id.*

124 *Id.* at 5-6.

125 *Roche v. Thorn*, No. WOCV2013-02261A, at 7 (Mass. Super. Ct. 2013).

126 The submittal of the amicus brief was acknowledged in the Appeals Court's decision. See *Heyn v. Dir. of the Office of Medicaid*, 89 Mass. App. Ct. 312, 313 n. 2 (2016).

127 *Id.*

128 *Id.* at 314-15.

129 *Id.* at 315.

gible for distribution.<sup>130</sup> The court rejected this argument, finding that the hearing officer’s conclusion regarding this provision “misapprehends the nature of annuity payments.”<sup>131</sup> Annuity payments comprise distinct and separately identifiable parts.<sup>132</sup> One part is income, and another part is principal. The income portion would be eligible for distribution to the applicant as income beneficiary, whereas the principal portion would have to be retained in the trust and could not be paid to the applicant under any circumstances.<sup>133</sup>

The court similarly rejected the agency’s argument regarding the allocation provision, noting that the court’s analysis was “unaffected by the authority of the trustee ... and noted by the motion judge, to determine the allocation as between principal and income of any proceeds of trust assets.”<sup>134</sup> The trustee’s ability to make such an allocation was specifically limited by reasonable accounting principles, practice, and state law, the court stated.<sup>135</sup> The Massachusetts Principal and Income Act creates a statutory presumption that all amounts received by the trustee are principal and not income.<sup>136</sup> Furthermore, this provision applies regardless of whether it is specifically stated in the trust.<sup>137</sup>

Also rejected was the hearing officer’s conclusion that the power of appointment somehow rendered the trust assets countable.<sup>138</sup> The hearing officer opined that under the special power of appointment, the applicant could appoint assets to her

children who in turn could pay them to her. The court determined that the hearing officer “cited no case in which either rationale was applied to support a conclusion that assets held in an irrevocable trust should be treated as countable assets for purposes of the trust grantor’s Medicaid eligibility, and we are aware of none.”<sup>139</sup> The court was then careful to note that just as the agency could not count assets held by family members who elect to contribute to the care of their elderly relatives as resources owned by the applicant, MassHealth similarly could not consider trust principal subject to a special power of appointment countable simply based on speculation that appointed assets could be returned to the applicant.<sup>140</sup>

The court also dispensed with the agency’s claim that the trustee’s ability to substitute assets for those of equivalent value rendered the assets of the trust countable.<sup>141</sup> The court found that this argument was “even less persuasive” than the hearing officer’s other rationale for upholding the agency’s denial.<sup>142</sup> Such an exchange “would not affect any distribution or diminution of trust principal, any more than a sale of trust assets to unrelated third parties, followed by a reinvestment of sale proceeds by the trust.”<sup>143</sup>

#### *D. Post-Heyn Board of Hearings Decisions*

MassHealth declined to petition the Supreme Judicial Court for further appellate review of the appeals court decision, and the decision became final on June 13, 2016.<sup>144</sup> Since the *Heyn* decision

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130 *Id.* at 316.

131 *Id.* at 317.

132 *Id.*

133 *Id.*

134 *Id.* at 317–18.

135 *Id.*

136 *See* Mass. Gen. Laws ch. 203D, § 18(a).

137 *See id.* at § 3(a)(4).

138 *Heyn*, 89 Mass. App. Ct. at 318.

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139 *Id.*

140 *Id.*

141 *Id.* at 319.

142 *Id.*

143 *Id.*

144 *See Roche v. Thorn*, No. 2015-P-0166 (Mass. App. 2016).

was released, elder law practitioners have reported many favorable decisions from the Board of Hearings on appeals of benefit denials to applicants with irrevocable trusts.<sup>145</sup> However, hearing officers have also attempted to distinguish *Heyn* in denying benefits to applicants with properly drafted irrevocable trusts; therefore, unfavorable decisions have also been reported as a result.<sup>146</sup> As far as this author is aware, MassHealth has not acquiesced to the *Heyn* ruling despite its decision against appealing the loss to the state's highest court and has continued to routinely deny benefits to applicants with properly drafted irrevocable trusts.

#### VI. What Lies Ahead: *Nadeau v. Thorn*, *Daley v. Sudders*, and the "Availability" Cases

MassHealth most recently attacked an applicant's continuing ability to reside in a home placed in trust either through the retention of a life estate interest in a deed transferring the remainder interest into trust or a use and occupancy clause in a trust. MassHealth claimed that such retained occupancy powers render the entire corpus of the trust a countable resource because the assets are available to the applicant and therefore countable even though the trust principal is not payable to the applicant.<sup>147</sup> In some instances, MassHealth has pressed on with these arguments even if an applicant with an irrevocable trust containing a use and occupancy clause or life estate died during

the hearing process.<sup>148</sup>

In the 2014 superior court case of *Nadeau v. Thorn*, a Worcester County Superior Court judge upheld a hearing officer's denial of an applicant's long-term care benefit application on the basis of a use and occupancy clause within his irrevocable trust.<sup>149</sup> In *Nadeau*, the applicant transferred his entire interest in a primary residence into an irrevocable trust he created in 2001.<sup>150</sup> No life estate was retained in the deed.<sup>151</sup> As in *Heyn*, the trust prohibited the distribution of principal to the applicant and allowed him to receive distributions of trust income only.<sup>152</sup> A provision in the trust allowed the applicant the right to use and occupy any residence that may from time to time be held in trust.<sup>153</sup>

In upholding the denial of the application, the hearing officer reasoned that the use and occupancy clause rendered the trust assets available to the applicant and thus was fully countable to him, despite his having no ability to receive distributions of trust principal.<sup>154</sup> In rendering this decision, the hearing officer declined to apply the any circumstances test to the analysis of whether any trust assets were actually payable to the applicant.<sup>155</sup> In so doing, the decision disregarded the controlling federal statute, which unequivocally

145 See e.g. Off. of Medicaid, Bd. of Hrgs., App. 1601959 (2016); see also Off. of Medicaid, Bd. of Hrgs., App. 1602888 (2016); App. 1516247 (2016), App. 1602421 (2016).

146 See e.g. Off. of Medicaid, Bd. of Hrgs., App. 1514956 (2016).

147 *Nadeau v. Thorn*, No. SJC-12205 (Mass. argued Jan. 5, 2017).

148 In *Daley v. Sudders*, the applicant for benefits died during the pendency of the application, and MassHealth has persisted in its claim that the life estate renders the entire corpus of the trust countable because he has a continuing right to live in the property. *Daley v. Sudders*, No. SJC-12200 (Mass. argued Jan. 5, 2017).

149 *Nadeau v. Thorn*, No. 1485CV02278.

150 Off. of Medicaid, Bd. of Hrgs., App. 1408634, at 4 (2014).

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at 8.

cally provides that an irrevocable trust, regardless of the type of property transferred into it, can only be countable if there are any circumstances under which the trust principal could actually be paid to the applicant.<sup>156</sup>

The hearing officer determined that because “the appellant’s former home is available to appellant by virtue of the fact that he can use and occupy the home and he is an income beneficiary of the Trust which is funded with the home,” the Massachusetts regulations direct that such principal is countable for Massachusetts benefit eligibility purposes.<sup>157</sup> However, there is no MassHealth regulation that authorizes the agency to count the principal of an irrevocable trust on the basis of an applicant’s continuing ability to reside in a home held in trust. In further attempting to rationalize his decision, the hearing officer specified that “the appellant may use the property during his lifetime either to occupy as his residence or to rent and derive income payable to him as an income beneficiary of the Trust; therefore, his former home, sitting in an irrevocable trust, is ‘available’ to him and countable for MassHealth Long-Term Care eligibility purposes.”<sup>158</sup>

Adding to the confusion is the fact that Massachusetts removed the definition of the term “available” (as in “available asset”) from its regulations in 2014 and did not replace it. “Available” was defined as “a resource that is countable under Title XIX of the Social Security Act.”<sup>159</sup> The removal of this definition opened the door for the agency’s ad hoc interpretations of the term that are essentially out of compliance with

the federal statute.

On appeal at the superior court, the agency attempted to rationalize the hearing officer’s decision by arguing that the *State Medicaid Manual*, promulgated in a Medicaid transmittal letter, contains language stating that a payment from a trust “may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property.”<sup>160</sup> The agency argued, and the superior court agreed, that because the manual defined a payment as a use and occupancy right, it follows that trust principal could be paid to the applicant and therefore is a countable asset, despite clear trust language stating that no principal could be paid to the applicant.<sup>161</sup> Such a conclusion failed to consider how a use and occupancy right, which expires moment by moment and carries no ability to invade or consume trust principal, equates to access to trust principal. A use and occupancy right is considered a type of income interest, which does not factor into an applicant’s eligibility determination because it is a form of income-in-kind, which is noncountable under Massachusetts regulations.<sup>162</sup> Additionally, the agency is now emphatically losing in its denials of such trusts before the Board of Hearings, as hearing officers have been categorically rejecting this argument.<sup>163</sup>

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160 *Nadeau*, No. 1485CV02278.

161 *Id.* at 7-8.

162 See *Hinckley v. Clarkson*, 331 Mass. 453, 454-455 (1954); see also *Langlois v. Langlois*, 326 Mass. 85, 87-88 (1950). A non-monetary “income-in-kind” interest, such as a “use and occupancy” interest, is noncountable under the MassHealth regulations. 130 Mass. Code Regs. 520.015(C).

163 Other recent decisions in which the agency has lost on the “use and occupancy” argument are: Off. of Medicaid, Bd. of Hrgs. 1603821 (June 21, 2016); Off. of Medicaid, Bd. of

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156 42 U.S.C. § 1396p(d).

157 Off. of Medicaid, Bd. of Hrgs., App. 1408634, at 8.

158 *Id.*

159 130 Code Mass. Regs. 515.001.

*Daley v. Sudders* also involves the denial of an applicant's eligibility for long-term care benefits. In this case, a life estate was retained in the deed transferring the property into an irrevocable trust. As in the *Nadeau* case, a hearing officer concluded and a superior court judge affirmed that the life estate rendered the trust assets available and thus countable resources relative to the applicant's eligibility for MassHealth long-term care benefits. This decision is troubling in its conclusion that a life estate reserved outside a trust can render the corpus of the trust a countable resource if no trust principal can be paid from the trust to an applicant. Even more troubling is that a life estate deed is a separate legal instrument that should have no bearing on the issue of whether a trust is a countable resource for Medicaid benefit eligibility purposes. The agency lost on a similar argument before the Massachusetts Superior Court that is on appeal in the *Daley* decision, and chose not to appeal such decision further.<sup>164</sup>

It is of note that in *Heyn*, MassHealth made a similar argument regarding the availability of the residence as a result of the grantor's retention of a life estate, but the agency lost on this point at the Board of Hearings phase of the appeal.<sup>165</sup> The availability argument therefore was not directly addressed in either the *Heyn* superior court or appeals court decisions. The appeals court noted in *Heyn* via footnote that the agency conceded in its appellate

brief that a life estate, in and of itself, did not render an applicant ineligible for Medicaid long-term care benefits.<sup>166</sup> Whether such a concession made by MassHealth during the *Heyn* Board of Hearings process will come back to haunt the agency in a subsequent appeal remains to be seen.

The use and occupancy cases are presently making their way through the Massachusetts court system. Oral arguments in *Nadeau v. Thorn* and *Daley v. Sudders* were heard by the Massachusetts Supreme Judicial Court (SJC) on January 5, 2017.<sup>167</sup> NAELA submitted an amicus brief in support of both cases, and also participated in oral arguments before the SJC.

## VII. Conclusion

Congress has established laws concerning an individual's ability to use irrevocable trusts in long-term care planning. In accordance with federal law, state Medicaid agencies must fairly and evenly enforce such laws and cannot implement more restrictive standards to prohibit individuals with irrevocable trusts from receiving Medicaid long-term care benefits. Given the current political climate, which tends to disfavor an individual's use of irrevocable trusts in long-term care planning, elder law attorneys across the country should be on alert that challenges similar to those faced by Massachusetts elder law practitioners regarding the treatment and defense of irrevocable trusts in long-term care planning could arise in their states at any time, if they have not already. However, if Massachusetts is an example, with zealous advocacy and the sharing of

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Hrgs.1602142 (June 1, 2016); Off. of Medicaid, Bd. of Hrgs. 1600434 (May 10, 2016); Off. of Medicaid, Bd. of Hrgs.1601959 (May 5, 2016); and Off. of Medicaid, Bd. of Hrgs. 1600653 (Apr. 21, 2016).

164 *Vergados v. Sudders*, No. 2015-00880-H, October 19, 2016.

165 Off. of Medicaid, Bd. of Hrgs., App. 1306280 at 10.

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166 *Heyn v. Dir. of the Office of Medicaid*, 89 Mass. App. Ct. 312, 313 n. 3 (2016).

167 See *Nadeau v. Thorn*, No. SJC-12205 (Mass. argued Jan. 5, 2017); *Daley v. Sudders*, No. SJC-12200 (Mass. argued Jan. 5, 2017).

knowledge and information among the elder law bar, attorneys and their clients can remain hopeful that the tide will continue to turn in favor of the continuing

use of irrevocable trusts in the long-term care planning context and in support of a more reasonable and consistent application of the federal law.

